SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. CUM-20-181

AVANGRID NETWORKS, INC., et al.
Appellant

v.

SECRETARY OF STATE, et al.
Appellee/Cross-Appellants

ON APPEAL FROM THE ORDER OF THE CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF AMICUS CURIAE

Mark N. Dion
Kenneth C. Fletcher
Former Maine Legislators

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I. INTRODUCTION

Amici are former legislators who have each and both addressed utility and energy policy and law considerations in Maine over many years in the context of the broad but limited authority of the legislative department of Maine government.

Kenneth C. Fletcher is a former State Representative (R-District 54, Winslow area) from 2002 to 2010, with service as ranking minority member on the Utilities and Energy Committee and on the Select Committee on Maine's Energy Future in 2009-2010. He was Director of the Maine Office of Energy Independence and Security from 2011 to 2013 where he successfully pursued efforts with colleagues in New England to help get natural gas into businesses and consumers in Maine. With both the Legislature and the Maine Office of Energy, he worked through policy and public-private partnerships to lower energy costs for Maine businesses and consumers.

Mark N. Dion is a former State Senator (D- District 28; Cumberland County from 2016-2018) with senior member status on the Energy, Utilities and Technology (EUT) Committee and the Conduct and Ethics Committee, Maine Senate. He previously served in the Maine House of Representatives for the 113th District from 2010 to 2016, and was Sheriff of Cumberland County from 1998 until 2010.

Amici have a distinct and unique understanding of the constitutional function of representative officers and the importance of constitutional limitations in the power of a given constitutional function, including limitations on legislative and direct initiative of legislation authority. Amici urge that the initiative is not legislation and not a proper exercise of the Electors' power under article IV, part three, section 18 of the Maine Constitution. The Amici join Avangrid in asking this Court to determine that this Initiative is facially unlawful and bar it from the ballot.

STATEMENT OF THE FACTS OF THE CASE

This case concerns an attempt to use the grant of popular legislative authority in Maine's Initiative of Direct Legislation Amendment—article IV, part Three, Section 18—to overturn an Order entitled, "*Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation*" duly issued by the Public Utilities Commission ("PUC") on May 3, 2019 in PUC Docket NO. 2017-00232 ("PUC Order" or "Order").[1]

The PUC Order made mixed findings of fact and law in which the PUC determined that there was a public need for the New England Clean Energy Connect transmission project ("NECEC project") and that the project was in public interest. The PUC closed the Order by approving the project. Parties aggrieved by

[1] Amici defer to Avangrid and Intervenors, Industrial Energy Consumers Group and Maine Chamber of Commerce for a description of the procedural history and background to the case.

the PUC Order, appealed it to this Court. In due course, this Court affirmed the PUC Order. *NextEra, LLC v. Public Utilities Commission,* 2020 ME 34, _ A.3d ___. At that point, the matters comprehended in the PUC Order and the *NextEra* decision, itself, became a final judgment.

As the appeal of the PUC Order was pending, some opponents decided to take a different approach. They prepared a proposal to be offered to Maine voters as "legislation" under the authority granted in article IV, part third, section 18 of the Maine Constitution—the direct initiative of legislation ("NECEC Initiative"). The form and terms of the Initiative now before this Court are as follows:

> **Sec. 1. Amend order. Resolved:** That within 30 days of the effective date of this resolve and pursuant to its authority under the Maine Revised Statutes, Title 35-A, section 1321, the Public Utilities Commission shall amend "Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation" entered by the Public Utilities Commission on May 3, 2019 in Docket No. 2017-00232 for the New England Clean Energy Connect transmission project, referred to in this resolve as "the NECEC transmission project." The amended order must find that the construction and operation of the NECEC transmission project are not in the public interest and there is not a public need for the NECEC transmission project. There not being a public need, the amended order must deny the request for a certificate of public convenience and necessity for the NECEC transmission project.

The Initiative is plainly a directive to the PUC. Reduced to its constituent elements, the Initiative purports to direct the PUC to take the following steps, some of which are express and some of which are necessarily implied. First, the Initiative mandates the PUC to change its "public interest" and "public need" findings. Although not expressly stated in the Initiative, if the PUC attempted to comply with its instructions, it would first have to formally vacate its findings and

then, having done so, would have to replace them with the "legislatively"-directed contrary findings. The PUC would then have to vacate its approval of the petition for the transmission project and replace with that approval the Initiative's mandated denial. The Initiative's sole purpose and objective is to employ supposed "legislation" to end the NECEC project.

In its scope, function, and purpose—this Initiative is unprecedented. Never in its 111-year history has Maine's initiative power been invoked for such a purpose. Neither, for that matter, has undersigned counsel found any court case outside of Maine in any popular-initiative/referendum state involving such a proposal.[2] The breadth of power the Initiative claims implicates fundamental first principles of our constitutional form of government. It implicates, as well, the nature and essence of the Maine Constitution's grant of legislative power to the legislative department of government and, through Article IV, Part Third, Section 18, to the people of Maine.

STATEMENT OF ISSUES PRESENTED

This brief presents the following issues: The Initiative purports to exercise a power so vast and so arbitrary, it exists nowhere in the framework of the Maine Constitution and its exclusion from the State's governmental powers was deliberate; the Initiative lacks the enacting clause required by Article IV, Part

[2] See, Attachment A, list of cases.

Third, Section 1 because its drafters understood that it was not legislation; and, the Initiative is not legislation within the meaning of either Article IV, Part Third, Section 18 or Article IV, Part Third, Section 1; the Initiative violates the separation of powers by purporting to exercise a distinctly judicial function.

Each of the foregoing issues presents a concrete and immediate legal question of law, which will not change should the voters approve the Initiative. In addition to the interests of the Parties and Intervenors, these questions implicate systemic and fundamental powers, including the ability of Maine citizens to discharge conscientiously and lawfully the rights and responsibilities that Article II of the Maine Constitution imposes on them as Electors.

II. SUMMARY OF THE ARGUMENT

In ratifying the Maine Constitution, the people of Maine granted the government what powers they concluded that the government should wield, allocated those powers among the three departments—legislative, executive, and, judicial—and declared those rights which all three departments were required to respect. In *Ex parte Davis*, the Law Court described in detail the limitations that the Maine Constitution imposed on all three departments. As to the limitations imposed on the Legislative Department, the Court said this: "The legislature are powerless in any attempt to legislate in violation of, or inconsistent with constitutional restraints." 41 Me. 38, 53 (1856).

Thus, although the power granted to the legislature has been termed "plenary", it is nonetheless subject to and must remain within express and implied constitutionally-imposed limitations. *League of Women Voters v. Sec'y of State*, 683 A.2d 769,771 (Me. 1996); *Inhabitants of Town of Warren v. Norwood*, 138 Me. 180, 1982-83, 24 A.2d 229, 235 (1941).

Each of the questions posed above presents a question of law and concerns whether the power NECEC Initiative purports to exercise lies within the Maine Constitution; whether that power is "legislative", as required by Article IV, Part Third, Section 18, and, whether it has complied with the mandatory preconditions that the Maine Constitution has imposed on all initiatives. In addition, and beyond these questions, are the further question whether the Initiative would arrogate a function reserved to the Judicial Department and to the Maine PUC, the quasi-judicial adjudicatory body that issued the PUC Order, in violation of the separation of powers under the Maine Constitution.

Each one of these questions concerns the threshold question as to whether the NECEC Initiative comes within the grant of direct initiative of legislation power that the people of Maine granted to themselves.

III. ARGUMENT

A. BARRING AN INITIATIVE THAT LIES OUTSIDE OF THE PEOPLE'S POWER TO LEGISLATE IS AN APPROPRIATE AND NECESSARY EXERCISE OF JUDICIAL POWER.

Many states have amended their constitutions to empower the people to initiate and repeal legislation. The exercise of these powers has prompted pre-election challenges on a wide range of bases. Such cases present a threshold question as to whether the court should consider the challenge at all. Virtually all of courts cited herein have recognized the seriousness of adjudicating such challenges because of the importance of respecting the people's right to legislate and the avoidance of engendering voter cynicism.

Pre-election challenges have been divided into three categories: 1) substantive; 2) procedural; and, 3) subject matter. James D. Gordon, III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 303 (1989). Substantive challenges assert that the initiative "is invalid because it conflicts with the paramount law." *Id.* Procedural challenges concern whether preconditions for the presentation of the initiative to the people—petitions, signatures, and, related matters—have been met. *Id.*

Subject matter challenges, by contrast, "assert[] that the ballot measure does not fall within the proper subject matter for direct legislation." *Id.* at. 302. These challenges may include express or implied limitations on the popular legislation and may also include challenges that the initiative is simply not legislation at all. *Id.*

Some courts have adopted the Notre Dame article's categorical divisions and have incorporated them into their own review of such pre-election challenges. *See, e.g., Coppernoll v. Reed,* 155 Wash.2d 290, 297,119 P.3d 318, 322 (2005); accord, *Herbst Gaming, Inc. v. Heller*, 122 Nev. 887, 882-83, 141 P.3d 1224, 1228 (2006).[3] The majority rule, then, is that most courts will adjudicate pre-election challenges based on procedural or subject matter defects but will not consider substantive challenges.

Whether a court should decide such challenges on the merits requires the application of longstanding principles of justiciability and ripeness, including assessments of the respective positions and interests of the parties. It also requires consideration of the broader issues that such questions raise, including not only the right of the people to vote on an initiative but also the implications of voting on a proposal which, well before the election, has been demonstrated to be patently beyond the people's power to legislate.

Bases on which Measures Barred from Vote. As noted above, courts have invalidated initiatives and referenda on a variety of grounds which include that the measure concerns a grant of power limited to the legislature, that the measure lies outside the initiative or referendum power; and that the measure violates an

[3] Some courts have divided these questions into two categories: "substantive" and "procedural." In these jurisdictions, the "substantive" category is consistent with the description of that category in *Pre-Election Judicial Review of Initiatives and Referendums.* The "procedural" category is divided into two subcategories, both of which match the "procedural" and "subject matter" categories in that article. See, *e.g., Calzone v. Ashcroft,* 559 S.W.3d 32, 35 (Mo. 2018).

express limitation on the legislative power. A review of the different circumstances under which courts have taken these steps is instructive. Courts have invalidated referenda seeking to overturn legislatures' ratification of constitutional amendments. *Decher v, Vaughn* 209 Mich. 182, 177 N.W. 388 (1920); *Barlotti v. Lyons*, 182 Cal. 575, 189 P.2d 282 (1920); *Prior v. Noland*, 68 Colo. 263, 188 P. 729 (1920); *Whittemore v. Terrel, Secretary of State*, 140 Ark. 493, 215 S.W. 686 (1919); *Hebring v. Brown*, 92 Or. 176, 180 P. 328 (1919); *see also*, *Opinion of the Justices*, 118 Me. 544, 107 A. 673 (1919).[4]

Courts have barred initiatives on the grounds that they would not have enacted legislation or were otherwise beyond the power granted to the people by the initiative amendment. *Philadelphia II v. Gregoire,* 128 Wash. 707, 911 P.2d 389 (1996); *Donovan v. Priest*, 326 Ark. 353, (31 S.W.2d 119 (1996); *Stumpf v. Lau*, 108 Nev. 826, 364 P.2d 120 (1992)(*Stumpf* was later limited but not overruled, *Herbst Gaming v. Heller*, 122 Nev. at 886, 11 P.3d at 1230); *State of Montana ex rel. Harper v. Waltermire*, 213 Mont. 425, 691 P.2d 825 (1984); *American Federation of Labor v. Eu*, 36 Cal.3d 687, 206 Cal. Rptr. 89, 686 P.3d 609 (1984); *see also*, *The Committee to Recall Robert Menendez from the Office of United States Senator v. Wells*, 204 N.J. 79, 7 A.3d 720 (2010) (recall power does not extend to United States Senator).

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[4] Eventually, the Supreme Court ruled that Article V limited the ratification of amendments to the U.S. Constitution to legislatures. *Hawke v. Smith*, 253 U.S. 221 (1920).; see also, *Leser v. Garnett*, 258 U.S 130 (1922) (ratification of XIX Amendment to U.S. Constitution).

Courts have also barred voter consideration of measures, including proposed constitutional amendments, on the grounds that they are barred by a specific exclusion. *See, e.g., Legislature of California v. Deukmejian*, 34 Cal. 658, 194 Cal. Rptr 781, 669 P2d 17 (1983) (reapportionment measure barred by decennial limitation); *Adams v. Gunter*, 238 So. 2d 824 (1970) (proposed constitution amendment a prohibited "revision"); *State ex rel. Steen v. Murray*, 144 Mont. 61, 394 P.2d 761 (1964) (proposed legislation barred by constitutional gambling exclusion); *McFadden v. Jordan*, 32 Cal.2d 330, 196 P.2d 787 (1948) (proposed constitutional amendment a prohibited "revision"); *Moore v. Brown*, 350 Mo. 256, 165 S.W.2d 657 (1942)(proposed constitutional amendment violated appropriations exclusion); *Mathews v. Turner,* 212 Iowa 424, 326 N.W. 412 (1931) (proposed constitutional amendment violates "single subject" limitation); *Bowe v. Secretary of Commonwealth*, 320 Mass. 230, 69 N.E. 2d 115 (1946)(initiative violated "free press" exclusion from the voter initiative amendment).

Courts have also held or opined that the initiative power may not be employed to ascertain public opinion. *Opinion of the Justices*, 262 Mass. 603, 160 N.E.2d 439 (1928); *Stumpf v. Lau*, 108 Nev. at 829, 364 P.2d at 122.

This Court is in accord with the foregoing decisions, although, until now, the question has not been squarely presented to it. *Wagner v. Secretary of State,* concerned a claim that an initiative, though presented as a statute, was actually a

constitutional amendment. The Court concluded that it was not but, in reaching that conclusion observed, "[t]he proposed initiative legislation does not present us with a subject matter beyond the electorate's grant of authority." 663 A.2d 564, 567 (Me. 1996). Underscoring this point, the Court cited to an Opinion of the Justices where the Justices had opined that initiative power did not extend to bonds. *Id.* (citing *Opinion of the Justices*, 191 A.2d 357, 359-60 (Me. 1963)).[5]

Several courts that have barred popular measures from the polls, have emphasized that the constitution is fundamental law, binding even the people, themselves. "It is fundamental that the people, themselves, are bound by their won constitution [and that] where they have provided therein a method for amending it, they must conform to that procedure." *Moore v. Brown*, 350 Mo. 256, 262, 165 S.W.2d 657, 659 (1942).

In *Bowe v. Secretary of the Commonwealth*, the Court observed that in adopting the Initiative Amendment, the people recognized that "[s]ome matters are naturally unsuitable for popular lawmaking....for various reasons." 320 Mass. 230,

[5] In its decision, the Superior Court concluded that in their 1996 Opinion, all the Justices had agreed that they should not adjudicate an initiative in advance of an election. Decision at 7. On closer examination, that conclusion is not borne out. In their separate opinion, Justices Glassman, Clifford, and Lipez advised that, "[e]xcept in rare instances, not present here, we believe 'it is inappropriate to address the constitutionality of an initiative measure before it has been presented to the votes.'" 673 A.2d 693, 699 (Me. 1996), quoting, *Opinion of the Justices*, 623 A.2d 1258 ,1264 (Me. 1993). That portion on the 1993 Opinion set forth the opinions of Justices Glassman and Clifford. They cited five cases for the principle that courts should not adjudicate pre-election challenges to initiatives. Yet several of those jurisdictions cited accepted pre-election adjudication for initiatives that lay outside the initiative power or were barred by an express exclusion. See, *e.g. Montana Citizens v. Waltermire, 224 Mont.* 273, 729 P.2d 1283 (1986). It is appears, therefore, that Justices Glassman, Clifford, and Lipez recognized that circumstances might arise in which pre-election adjudication of an initiative would be both warranted and appropriate.

247, 69 N.E.2d 115, 128 (1946). Therefore, "[t]he people for their own protection have provided that the initiative shall not be employed with respect to certain matters." *Id.*[6]

Although some of the foregoing cases concern attempts to apply initiatives and referenda to non-legislative matters and others concern the application of express and implied exclusions from the those powers, the courts' fundamental rationale is the same—courts will enjoin popular measures that lie outside of the constitutional grant to the people of the right to enact and repeal legislation.

Standards applied to Judicial Review of Initiative. All courts recognize the extraordinary importance of popular initiative power. That is why many have developed rigorous standards that must be met before the court will bar a measure from the ballot. The review standards courts have developed include the following: The measure would "palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions and circumstances." *Stumpf v. Lau,* 108 Nev. 826,830, 364 P.2d, 120, 122; the measure's invalidity was "clear and compelling", *Convention Ctr. Referendum*

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[6] The Massachusetts Initiative Amendment allows for popular proposals of constitutional amendments and laws. It contains a long list of subjects which are excluded from the authority granted in the Initiative Amendment. These exclusions include, "the appointment, qualifications, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political subdivision…." Massachusetts G.L.A. Const. Amend. Art. 48, Init, Pt. 2, §2. The *Bowe* Court was concerned with the exclusion of legislating authority on freedom of the press and freedom of peaceable assembly and, by implication, freedom of speech. *Bowe v. Secretary of the Commonwealth*, 320 Mass. 230, 252, 69 N.E. 2d. . 368, 130-131 (1946); see also, Massachusetts G.L.A. Const. Amend. Art. 48, Init, Pt. 2, §2.

Comm. v. D.C. Bd. of Election & Ethics, 441 A.2d 889, 913 (D.C. 1981); the measure is "clearly and conclusively defective", *Floridians Against Casino Takeover v. Let's Help Fla.*, 363 So.2d 337, 342 (Fla. 1978) (measure sent to the ballot).

Reasons for Pre-Election Adjudication. Where these high standards have been met, courts will bar the measures from voter consideration. In doing so, they have offered various rationales, all of which are pertinent here. One court has observed that a popular measure affects the interests of "the whole people of the state" and that "the whole people are interested in seeing the election laws enforced" and each person "has a direct personal interest in the proper conduct of elections." *State ex rel. Steen v. Murray*, 144 Mont. 61, 67-68, 394 P.2d 761, 764-765 (1964).

Another, has characterized restrictions on the initiative power (which would include the fundamental exclusion of measures that are not "legislative") as the command of the people, themselves, explaining that, "[t]he people for their own protection have provided that the initiative shall not be employed with respect to certain matters." *Bowe v. Sec'y of the Com.,*320 Mass. 230, 247, 69 N.E. 2d 115,128.[7] This being, so, the Court reasoned that, "[u]nless the courts had power

[7] Although the Massachusetts initiative amendment lists several exclusions, the Justices have also opined that it is limited to legislation. See, *Opinion of the Justices*, 262 Mass. 606, 160 N.E. 441.

to enforce those exclusions, they would be futile, and the people could be harassed by measures of a kind they had solemnly declared they would not consider." *Id.*

Some courts have also concluded that a leaving a demonstrably invalid measure on the ballot would disserve the voters.

> The presence of an invalid measure on the ballot steals attention, time and money from numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

The Court then proceeded to decide the issue. *Am. Fed'n of Labor v. Eu,* 36 Cal. 3d 687, 697, 686 P.3d 609, 615 (1984). In a case in which the petition process, itself, was barred, the court said that to allow the process to go forward would, in effect, "invit[e] the citizens to sign a petition in the belief that they are participating in a constitutional process—and adversely affect[] public confidence in the integrity of the system." *The Committee to Recall Robert Menendez*, 204 N.J. at 100, 7 A.3d at 732. Another court considered the consequences of failing to enjoin a "palpably" invalid and "futile" measure saying,

> [I]f the measure passed…and this court were…asked in some later legal maneuver to tell the voters that their vote as of no effect and that we knew all along that they were voting on measure that was contrary to the provisions of the United States Constitution, and was based on an invalid petition that had been worded and circulated in a manner that did not conform with the Nevada Constitution.

Stumpf v. Lau, 108 Nev. 826, 835, 364 P.2d, 120, 126. Under those circumstances, the *Stumpf* court suggested the voters would be likely conclude that the court, itself, had failed to discharge its duties. *Id.*

The foregoing are representative of decisions in many jurisdictions in which courts have considered pre-election challenges to popular measures on the merits and barred them from the ballot. Invariably, courts approach these questions with great deference to the importance of the people's right to vote on such measures and will bar them from the ballot only when their invalidity is manifest.

In numerous decisions, this Court has evidenced profound respect for the initiative process. Nonetheless, the NECEC Initiative lies so far outside the confines that the people of Maine, themselves, Amici asks this Court to bar it from the ballot. Such an action would neither disrespect the initiative process nor the voters of Maine. It would, rather, vindicate the Maine's constitutional form of government, including the limits on the power the government, itself, can wield as well as the true extent of the popular power to legislate.

In Maine, such considerations should begin with the citizens' special status as "Electors" under article II of the Maine Constitution. Learned authority has observed that article II, "...establishes the framework for how the people choose who will govern them. It thus forms a thematic bridge between [Article I] which enumerates the rights of the people, and the articles to come, relating to the powers and duties of government." M. Tinkle, *The Maine Constitution*, at 65 (2d. 2013).[8]

[8] Noting that neither the Massachusetts Constitution of 1780 nor the United States Constitution had a similar provision, this authority identified the Delaware Constitution of 1792 and the Connecticut Constitution of 1818 as the probable sources of assigning Maine voters the constitutional office of "Electors." *Id.*

The singular status that article II extended to every Maine voter evidenced a determination by the drafters of Maine's Constitution that, in a representative democracy, voting is elemental; that in voting, citizens perform a public act fundamental to the well-being of the government for which they deserve constitutional recognition and dignity.

Thus, under article II, when engaged in the act of voting, Maine citizens assume a distinct constitutional status and they retain that status until they have completed their electoral duties. So highly did the drafters of Maine's Constitution value this role that they invested Electors with limited immunity "from arrest during…their attendance at, going to, and returning [from the polling place]." *Hobbs v. Getchell*, 8 Me. 187, 189 (1832). This limited immunity is substantively identical to that protection the Constitution has always provided to Representatives and Senators. Maine Const. art. IV, pt. 3, § 8.

Further evidence of the importance the Maine Constitution accords the act of voting are the remarkably detailed procedures the Constitution prescribes for holding elections and ensuring open and verifiable vote tallies. *See* Maine Const. art. IV, pt. 1st, § 5, art. IV, pt. 2d. §3, pt. 5th, §3.

Taken together, these constitutional provisions demonstrate the high value that the framers of Maine's constitution placed on rights and duties of citizens as Electors and the electoral process, itself. It must be assumed that in discharging

their role as Electors, the people of Maine understand and accept that they are acting within the framework of a constitutional system in which the powers of government, though extensive, are not limitless. And, it must be further assumed that they also understand that, for their own protection, the sovereign powers granted to government have been allocated among the three departments to ensure guard against an excessive concentration of power in any particular department.

Moreover, it is clear that, in granting themselves, the power to initiate and repeal legislation, they understood that they did not grant themselves unlimited power. Rather, they carefully and deliberately granted themselves legislative power **only**.

It must also be assumed that the Electors understand that in Maine judicial review is almost as old as the State of Maine, itself, *Lewis v. Webb*, supra. And, with due regard for both the Legislature and the people, this Court has always exercised restraint and applying that authority but, when confronted with the requirement to exercise it, has not shrunk from doing so. *Ex Parte Davis*, 41 Me. 38, 54 (1856).Enjoining the NECEC Initiative from the ballot would not, therefore, constitute an abridgment of the people's right to initiate legislation. To the contrary, it would vindicate and confirm that right—within the confines that the people, themselves, set for it. Such a decision would also clearly mark the boundaries of the initiative right and serve as a salient guide for all those who

would invoke this awesome and solemn power as to what they may propose to the Electors and what they may not. As this Court has observed, in the long run, such a delineation would "do much to render the permanent landmarks of the constitution and to promote the ends of the government of a free people." *Id.*

As former elected officials, we, too, greatly respect the people's right to von popular legislation. We also believe, however, that initiatives must comport with the actual grant of legislative authority and, where they do not, the Electors should not be burdened with casting a futile vote.

In addition for these reasons set forth above, this case meets general ripeness standards. See, *e.g. Maine AFl-CIO v. Sup't of Ins.*, 1998 ME 257,¶7, 721 A.2d 633. It also meets even more demanding standards that courts have developed for such cases. *Donovan v. Priest*, 326 Ark. At 359, 931 S.W.2d at 121 -122.

B. THE NECEC INITIATIVE HAS INVOKED THE PEOPLE'S POWER TO LEGISLATE TO PROPOSE AN EXERCISE OF SOVEREIGN POWER THAT LIES OUTSIDE OF THE POWERS GRANTED TO GOVERNMENT BY THE CONSTITUTION OF MAINE

The power that the Initiative purports to exercise is a form of brute sovereign power of a type that lies entirely outside of Maine's constitutional form of government. It is also, however, a form of power with which those who precipitated the American Revolution and who established our system of government knew very well and rebelled against. They sought to banish the

exercise of such power, not only by the British government, but by the governments they established for themselves and their posterity.

When placed in its true political and legal context, the Initiative stands out as an attempt to exercise a kind of governmental power that does not exist in our form of government and whose antecedents can only be found in the formative days of the United States and the several states which comprised it. In short, the Seventeenth Century struggle between the Crown and Parliament resulted in Parliamentary supremacy over the Crown. Leonard Levy, *Origins of the Bill of Rights,* Yale University Press, (ed. 1999) at 4.

By the 1760's, Parliament was truly ascendant and began exercising increasing and peremptory control over the American colonies.[9] Of particular note was the Declaratory Act of 1766 by which declared its supremacy as follows:

> the King's majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons of *Great Britain* in parliament assembled had, hath, and of right out to have, **the full power and authority** to make laws and statutes of sufficient force and validity to bind the colonies and the people of *America*, subject of the crown of *Great Britain,* **to all cases whatsoever**...

Documents of American History, Edited by Henry Steele Commager, (ed. 1948) at 60-61. (Attachment B) (Italics in original, bold supplied).

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[9] A partial list of Parliament's legislation would include the Stamp Act (1765); the Quartering Act (1765); the Declaratory Act (1766); the Townshend Revenue Act (1767); and, the Intolerable Acts, including the Boston Port Act (1774), the Massachusetts Government Act (1774), the Administration of Justice Act (1774), and the Quebec Act (1774). *See also*, Origin of the American Revolution 1759-1766, Bernhard Knollenberg, Free Press (ed. 1961), *passim*; The Founding of a Nation, Merrill Jensen, Oxford University Press (ed. 1968), Parts Two and Three.

In his *Commentaries on the Law of England*, written from 1765-1769, Sir William Blackstone described Parliament's in even more expansive terms:

> **[Parliament]** hath sovereign and uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of all laws, concerning all possible denominations, ecclesiastical, temporal, civil, military, maritime, or criminal; this being the place where that **absolute despotic power**, which must in all governments reside somewhere, **is entrusted by the constitution of these kingdoms.**

Blackstone, *Commentaries on the Laws of England*, Book 1, Ch. 2, Sec. 3 (emphases supplied). He continued, "I[t] can change and create afresh even the constitution of the kingdom and of parliaments themselves…It, **in short, can do everything which is not naturally impossible[.]**" *Id.* (emphasis supplied).

The colonists responded to Parliament's unlimited claims to authority over them by asserting that Parliament's power was subordinated to fundamental law, including Magna Carta and their colonial charters which were "fixed" and which even Parliament was obligated to respect. Creation of the American Republic 1776-1787, Gordon Wood *Creation of the American Republic*, 1776-1787, University of North Carolina Press, (ed. 1998), pp. 273-282 *see, e.g.,* Documents of American History, *Letters of the Massachusetts House to Ministry*, at 65.

As the United States prepared to declare formally its independence from Great Britain, many of the states began drafting their own constitutions. Virtually all were greatly influenced by John Adams' 1776 tract, *Thoughts on Government*,

which advocated for the separation of powers among the Legislative (which was to be bicameral), Executive, and Judicial Departments. *See* John Adams, Revolutionary Writings 1775-1783, *Thoughts on Government*, The Library of America, (ed. 2011), 49-57, *passim.* As to the Judicial Department, Adams was emphatic: "the judicial power ought to be distinct from both the legislative and the executive, and be independent of both, that so it may be a check on both, and both checks upon that." *Id.* at 54. In addition to separating those powers included within the constitutional framework, the Massachusetts Constitution, and several others, included Declarations of Rights, in attempt to protect fundamental liberties as fundamental law.

Thus, the majority of states adopted constitutions which had been ratified thorough extraordinary, *ad hoc* conventions and which established the framework of government and secured essential and "unalienable" liberties as the supreme law. These written constitutions became the fundamental law of each state.

Despite having taken these steps, Americans soon found that the powers of government their constitutions had so carefully described and segregated and the basic rights those constitutions had guaranteed were under assault from an unexpected quarter—the very legislatures they, themselves, had created.

Even before the Constitutional Convention, Thomas Jefferson and James Madison both rallied against the legislature's aggressive assertions of power.[10] At the Constitutional Convention, itself, James Wilson, later a justice of the United States Supreme Court,[11] was recorded as warning observing that, "[a]fter the destruction of the King in Great Britain, a more pure and unmixed tyranny sprang up in parliament than had been exercised by the monarch." The Records of the Federal Convention of 1787, Vol II. M. Farrand (ed. 1974), at 300-301. In making points, Wilson was not simply revisiting the grievances that had led to the American Revolution, he was warning against the current excesses of state legislatures. On this point, he cautioned his fellow delegates that, in their attempts to draft a constitution for the United States, which separated the legislative, executive, judicial powers, they were falling short because, "we had not guarded agst. the danger on this side by a sufficient self-defensive power either in the Executive or the Judiciary." *Id.*

In the *Federalist*, Madison continued his complaint against the general complaints against the legislature, warning that it was "drawing all power into its impetuous vortex." The Federalist, edited, Benjamin Fletcher Wright, ed. 2004 at 319. Madison was concerned that, faced with the legislative department's

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[10] Thomas Jefferson, Writings, *Notes on the State of Virginia*, Editor, Merrill Peterson, The Library of America (ed. 1984), p. 124; James Madison, Writings, *Memorial and Remonstrance Against Religious Assessments*, Editor, Jack Rakove, The Library of America, (ed. 1999), p. 29-36.

[11] James Wilson, served as a Justice of the United States Supreme Court from 1789-1798.

voracious appetite for power, the written, fundamental law, with careful separation of powers and protected of unalienable rights would prove only "parchment barriers." *Id.* at 343.[12]

The implications of these excesses were profound, as Jefferson observed, the placement of the legislative, executive, and judicial in one place would be "precisely the definition of despotic government." The Thomas Jefferson Reader, supra, at 132; The Federalist, supra at 345. Federalist No. 48 (Madison, quoting Jefferson). Nor, Jefferson went on, was it any solace that the legislatures were popularly elected because, "[o]ne hundred and seventy-three despots would surely be as oppressive as one." *Id.*

Of particular concern were repeated legislative intrusions into the province of the judicial department. Jefferson raised this in his *Notes on Virginia*, in which he complained of the "many instances" in which the legislature had intervened in cases pending before the judicial department; a complaint which Madison quoted at length in Federalist No. 48. *See*, Jefferson, Writings, supra at 246; The Federalist, supra at 346. Madison added his own knowledge of instances in which "cases belonging to the judiciary department frequently [had been] drawn within

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[12] *See also*, Letter from James Madison to Thomas Jefferson, October 17, 1788 on demands for the inclusion of a list of fundamental liberties in the United States Constitution: "...experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed in every state. In Virginia, I have seen the bill of rights violated in every instance where it had been opposed to a popular current." James Madison, Writings, supra at 420.

the legislative cognizance and determination." *Id.* at 346. Hamilton, too, condemned legislative intrusion into the judicial department, which he deplored; but for Hamilton there was an absolute bar that the legislature should never cross: "A legislature, without exceeding its province, cannot reverse a determination once made in a particular case", adding in contrast that the legislature could, "prescribe a new rule for future cases." *Id.* at 508 (Federalist No. 81).

For Hamilton, an essential, indispensable counterweight to legislative overreach was judicial interpretation and enforcement of the fundamental law. As Hamilton put it, "[Constitutional limitations] can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* at 491 (Federalist No. 78).

Emphasizing the essential character of a constitution approved by the people at large, Hamilton forcibly rejected as "unacceptable" any suggestion that the judicial exercise of such power would "imply a superiority of the judiciary to the legislative power:

> There is no position on which depends clearer principles, than that every act of a delegated authority, contrary to the tenor of commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they expressly forbid.

Id. at 492.

Hamilton advocated this role for the judiciary because, "[t]heir courts were designed to be an intermediary body between the people and the legislature, in order, among other things, to keep the latter within the limits of their authority." *Id. at 492.* Hamilton explained that the constitution was "original" whereas legislative authority was "derivative." *Id.* at 493[13] He went on to note that, "[u]ntil the people have, by some solemn and authoritative ac, annulled or changed the established form, it is binding of themselves collectively, as well as individually[.]" *Id.* at 494. Therefore, he concluded in the instances in which an "irreconcilable variance" arose between a statute and the constitution, "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." *Id.*

In *Marbury v. Madison*, Chief Justice Marshall agreed, noting that, "[i]t is a proposition to plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by ordinary act." 5 U.S. (1 Cranch) 137, 177. "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* Chief Justice Marshall observed that any other would undermine not only the United States Constitution, but all written constitutions. *Id.* at 178.

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[13] *See also*, "The legislative department's power is "derivative and limited." James Madison, Writings, *Memorial and Remonstrance against Religious. Assessment, supra* at 300 (describing the Virginia Constitution).

So widespread and pervasive were concerns about legislative intervention in judicial proceedings that, writing more than 100 years later, Professor Edward Corwin observed, "[t]he mischief of what has been 'prerogative legislation,' that is, legislation modifying the positions of parties before the law, was one of the most potent causes of the general disrepute in which state legislatures had fallen before 1787." E. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. (No. 4) 247, 258 (1914); *see also* G. Wood, Creation of the American Republic 1776-1787, *supra,* 453-463. The Supreme Court recounted this same history in *Plaut v. Spendthrift Farms, Inc.* 514 U.S. 211, 223-224 (1995), citing, *inter alia, Lewis v. Webb,* 3 Me. (3 Greenl.) 326 (1825).

In sum, the foregoing discussion shows that on the eve of the American Revolution, Parliament was claiming the right to exercise absolute and even despotic power over the colonists. In doing so, Parliament rejected claims that its powers were subordinate to fundamental laws, including Magna Carta and the colonial charters.

After declaring independence, most of the states established written constitutions as the fundamental law and superior law of the land. These post-Independence documents all had the following attributes: they documented sovereign powers that the people had granted government which included some but all not sovereign power; they organized and allocated the sovereign powers

granted into the three departments of government; and, they set forth those liberties the people deemed to be essential.

Notwithstanding these measures, in several states, the legislatures frequently overrode constitutionally-protected liberties, usurped the powers of the Executive and Judicial Departments, and, with respect to the latter, interfered with private litigation. Over time, the Judiciary's assertion of the power to authoritatively and finally interpret the fundamental law was, as Hamilton predicted, indispensable to the integrity of our constitutional system.

C. THE INITIATIVE PURPORTS TO EXERCISE A POWER WHICH THE PEOPLE OF MAINE DID NOT GRANT TO THE GOVERNMENT OF MAINE.

The Initiative claims to exercise a form of sovereign power that the people of Maine did not grant to the government of Maine. By its plain terms, it is a directive to the PUC to vacate the PUC's findings that the there is a public need for the NECEC transmission project and that it is in the public interest. And, then its terms direct that the PUC vacate its approval of the project and replace that approval with a denial. The Initiative does not—because it cannot—represent that anything has changed as a matter of fact since the entry of the PUC Order. It does not—because it cannot—seek to re-open seek the PUC Order. It does not—because it cannot—present any rationale for its directive. It merely commands. It is nothing for than an *ipse dixit* in the guise of a popular initiative.

Moreover, because the initiative process is limited to actual legislation under article IV, part third, section 18, which the NECEC Initiative manifestly is not, there is no appeal from a vote of approval of the proposed initiative. There is no authority in the Maine Constitution by which the Electors or Legislature can overturn a finally adjudicated decision by peremptory and unappealable directive, mandating the removal of considered findings of fact and law and their replacement by contrary findings and the reversal of that decision's ultimate judgment.

In its bald and unequivocal terms, the Initiative is a throwback to Parliament's claim that it "hath, and of right ought to have, full power and authority to makes laws and statutes of sufficient force and validity to bind the colonies and people of America...**in all cases whatsoever**." Documents of American History, supra at 61 (emphasis supplied). As the Massachusetts Supreme Judicial Court found of far less brazen legislative intervention into judicial authority, an attempt to exercise "absolute despotic power" which Parliament claimed and which according to Blackstone, "must in all governments reside somewhere." *Holden v. James*, 11 Mass. 396, 404 (1814), quoting, 1 Blackstone's *Commentaries*, at 160 (cited in, *Lewis v. Webb*, 3 Me. (3 Greenl.) at 334.[14]

[14] *Holden v. James* and *Lewis v. Webb* are discussed further below.

No department of Maine government, lawfully exercising the authority the people of Maine have granted to it, can peremptorily overturn an adjudicated decision and direct the reversal of the findings set forth therein. Cloaked in the honored legislative power that the people of Maine granted to themselves in Article IV, Part Third, Section 18, the NECEC Initiative would present the Electors of Maine with an illusion—a seemingly valid opportunity to "legislate" which, in reality is an unprecedented and illusory claim of authority lying entirely outside of the Constitution of Maine.

D. THE NECEC INITIATIVE IS NOT LEGISLATION AND DOES NOT COME WITHIN THE POWER GRANTED IN ARTICLE IV, PART THIRD, SECTION 18.

1. Article I, Part Third, Section 1 Mandates an Enacting Clause for Legislation and the NECEC Initiative Lacks an Enacting Clause

When the people of Maine added the initiative power set forth in Article IV, Part Third, Section 18, to the Maine Constitution, they sought only to place the authority in themselves to propose and to enact **legislation**. This is evident from the structure and content of the assemblage of amendments that the Electors approved in 1907.

In 1907, the Maine Legislature approved a series of amendments to the Maine Constitution which, when approved by the Electors, would invest the people

with the right of initiative and referendum. The initiative and referendum, 1907 Resolves of Maine, 73rd Legislature, ch. 121

The first section of this series of proposed amendments did not create a new constitutional provision but, rather, amended a longstanding constitutional provision—Article IV, Part First, Section 1 which had mandated the wording for the enacting clause that must accompany legislation. The original mandate that the enacting words "shall be, '*Be it enacted by the Senate and House of Representatives in Legislature assembled.*'" The 1907 Amendments changed this requirement so that the words "shall be, '*Be it enacted by the people of the state of Maine.*'" *Id.*, *see also*, Maine Const., art. IV, Pt. 3, §1.

Since its ratification, the Maine Constitution has required that legislation by announced by an enacting clause. The adoption of the initiative amendments did not change that; they only changed the mandated wording to account for the grant of popular legislative power.

The Nevada Supreme Court explained the requirement of an enacting clause on legislation in *Kerby v. Lurhs*, 61 Nev. 416, 131 P.2d 516 (1934). It began by stating the "general rule" that "a provision in a state constitution requiring an enacting clause in a statute is mandatory and the omission renders the statute void." *Id.* at 520, citing, *Commonwealth v. Illinois Central R. Co.,* 160 Ky. 745,

170 S.W. 171 (1914) and that such was the rule in Nevada. *Id,* at 518, citing, *Nevada v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738 (1875).

Kerby quoted at length from the constitutional scholar, Thomas Cooley, on the reason for the rule which, in pertinent part, was as follows: "...nothing becomes the law simply and solely because the men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by that instrument which invests them with the power, and under all the forms which that instrument has rendered essential." *Id.* at 518, quoting *Cooley's Constitutional Limitations*, 6th Ed. At 155.

This appears to be a question of the first impression in Maine, so the question arises whether the requirement in article IV, part third, section 1 is mandatory and whether its absence, by itself, invalidates the NECEC Initiative, whether it is in fact legislation or not. Beginning with Section 1 itself, it is evident that it has employed mandatory language—that is, that the enacting language for legislation "shall be the language the Constitution prescribes." See, e.g.,

Moreover, the directive comes from the Constitution itself and therefore carries the force of fundamental law and should be given full effect. Determining the meaning and effect of this requirement is a matter of judicial construction. *Morris v. Goss*, 147 Me. 89, 96-97, 83.A.2d 556, (1951).

To begin with, it is clear that because Section 1's enacting clause mandate was revised as part of the amendments that granted the people the authority to initiate and repeal legislation, it was intended to apply to those enactments as well as laws passed by the Legislature.

Indeed, if anything, the explanation offered by *Cooley's Constitutional Limitations,* as quoted by the *Kerby Court,* apply with even greater force to popularly enacted legislation—that is, that just as duly elected legislators should, so, too, **the people** should "express their determination to that [that the initiative should become law], in the mode pointed out by that instrument which invests them with the power, and under all the forms which that instrument has rendered essential." *Cf.,* Cooley's Constitutional Limitations, supra; *see also*, *Kerby v. Luhrs,* 131 P.2d at 518. This requirement ensures not only that, when presented with an initiative, the people understand that they are enacting a law but also that those who originate the petition acknowledge the same and ensure that their proposal is, what the Maine Constitution allows, popular **legislation.**

Pertinent to this question is this Court decision in *Payne v. Graham*, 118 Me. 251, 107 A. 709 (1919). There, the Legislature had passed a criminal statute as emergency legislation, which an emergency clause. A person convicted under the newly-enacted statute sought habeas relief on the grounds that, although the

Legislature had included an emergency clause, it did not comport with the requirement imposed by Article IV, Part Third, Section 16. *Id.* at 709-10.

The *Payne* Court noted that Section 16 required not only that the Legislature include an emergency finding but, in accordance with Section 16, was also required to include a recitation of "the facts" constituting the emergency. *Id.* at 710. The Court construed this requirement as "a limitation upon legislative power, and that without conforming to it, no act can be made an emergency act and as such be given immediate effect." *Id.,* accord, *Morris v. Goss,* 147 Me. at 98. The *Payne* Court noted that at oral argument representations were made as to the basis for the emergency but found that, "these facts are not, as the Constitution requires, expressed in the preamble." For that reason, the Court granted the habeas petition, concluding that the statute could not be given emergency effect. *Id.* at 711.

Payne and *Morris* stand for the principle that the conditions set forth in the initiative and referendum amendments are limitations on the power of the Legislature to enact laws. From these decisions, it follows that constitutional requirements also limit the people's power to enact or repeal laws.

Article IV, Part Third, Section 1 requires that the legislation be prefaced with the mandate enacting clause. The NECEC Initiative lacks such a clause. It fails, therefore, to comply with Section 1's constitutional mandate and, for this reason alone—though there are several others—is invalid.

2. The NECEC Initiative is not "Legislation".

Article IV, part third, section 18 and its companion section in article IV, Part third, section 16 together authorize the enactment and repeal of **legislation**—they grant no other authority. This is evident from Section 18's title, which is "Direct Initiative of Legislation" and its plain terms which authorize the Electors to propose "any bill, resolve or resolution, including bills to amend or repeal emergency legislation…" Maine Const. art. IV, pt. 3d, §18. Section 18 underscores this manifest and express requirement that, any properly qualified initiative be first submitted to the Legislature so that the Legislature might either enact it into law "without change" or forward it to the Electors "with any amended form, substitute, or recommendation of the Legislature" as a "competing measure" which the people would have the right to accept or reject." *Id.*

The Law Court has recognized that those provisions concern popular legislative power. *Moulton v. Scully*, 111 Me. 498, 89 A. 944 (1914). (Initiative and referendum amendments apply "only to legislation, to the making of laws, whether it be a public act, a private act, or a resolve having the force of law." *Id.* at 953). To begin with, it should be noted that the object of the Initiative's "amendment"—the PUC Order—is not, itself, legislation.[15] It is, rather, a standing

[15] That the Initiative is not "legislation" and is not a "resolve" have been briefed by Avangrid and the Intervenors, Industrial Energy Consumers Group and the Maine Chamber of Commerce.

order from an adjudicatory body.[16] The words that the Initiative would purport to exercise are mixed findings of fact and law. Therefore, though not acknowledged in the Initiative, it actually would require the PUC to take two sets of separate but interrelated and sequential steps.

Also, as has been noted above, the Initiative lacks an enacting clause. Whether such a clause was indispensable to the Initiative's validity, as argued above, or not, its absence is telling. It must be assumed that the Initiative's drafters were aware of Article IV, Part third, Section 1's requirement and that they made a deliberate decision to omit it. The obvious inference is that they knew then and they have known all along that the Initiative is not legislation. And, that, if anything, the inclusion of an enacting clause would only make that all the more obvious.

Considering the actual application of the Initiative—breaking it into its elemental parts—further demonstrates its non-legislative character. First, before the PUC could comply with the Initiative's directive to enter findings that the NECEC project is not in the public interest and there is no public need for it, the PUC would have to vacate those findings. Only then could the PUC enter the Initiative-directed findings. After having vacated those, the PUC must replace

[16] The PUC has the statutory authority to "amend" its own orders. It also has the authority to "rescind" and "alter" them. 35-A M.R.S. §1321. The Initiative does not use the words "rescind" or "alter", apparently because these words are not commonly employed to describe the legislative process.

them with negative findings. Having taken those steps, the PUC would then have to vacate its approval of CMP's CPCN application and enter an order denying it.

It is apparent, therefore, that the Initiative's use of the words "amend" and "amended" are not used in the same sense they would be used in the legislative process. To be sure, courts amend orders, but there are established processes for doing so. *See, e.g.* M.R. Civ. P. 59; *cf.* M.R. Civ. P. 60-61.[17] In addition, it is, of course, when the courts amend a judgment, they act pursuant to their own inherent judicial authority and in accordance with their own procedures; not at the direction of another department of government, whether it be legislative or executive.

In directing the PUC to reverse itself on these aspects of the PUC Order, the Initiative does not purport to authorize the PUC to re-open the petition, take more evidence, and then change the PUC Order; rather, by legislative fiat, it baldy directs the PUC to make the mandated findings and enter the mandated denial.

Thus, broken down into its essential steps and shorn of its misappropriated legislative terms—"amend" and "amended"—it becomes apparent that the Initiative does not propose to "amend" the PUC Order at all. It proposes to replace the PUC Order with a new legislatively-imposed Order with new and contrary findings and the denial of CMP's petition.

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[17] See, e.g., Blacks Law Dictionary, (ed. 1968): "Amendment: In legislation, it is a modification or an alteration proposed to be made in a bill on its passage, or an enacted law; also such modification or change when made. Citing, *Brake v. Callison*, C.C. Fla, 122 Fed. 722; *State v. MacQueen*, 82 W. Va. 44, 95 S.E. 666, 668.

On this point, the Initiative must be compared with the PUC's statutory power over its orders. Statutory law provides the PUC with the authority to amend its own orders. 35-A MRS §1321. The Initiative, however, is a directive, based on a claim of legislative authority, which purports to force the PUC to "amend."

In addition to authorizing the PUC to "amend" an order, Section 1321 also authorizes the PUC to "rescind or alter" any order. In its effect, without acknowledging this directly, the Initiative directs the PUC to first "rescind" the PUC Order and issue a new order with contrary findings on public interest and public need factors and to "rescind" its approval of the NECEC petition and replace that approval with a denial. It seems likely that, even though the Initiative rests its authority in part on Section 1321, it does not use the words "rescind" or "alter", apparently because these words are not commonly employed to describe the legislative process.

From the foregoing, it is apparent that the NECEC Initiative is not legislation and, consequently, does not come within the legislative power that the people of Maine granted to themselves in article IV, part third, section 18.

E. THE INITIATIVE VIOLATES THE SEPARATION OF POWERS BY PURPORTING TO EXERCISE A JUDICAL POWER.

As noted above, the Initiative plainly intends to issue a directive to the PUC to reopen a finally adjudicated case and supplant its considered findings and

decision with those the Initiative mandates. Early in Maine's history, the Legislature attempted the application of a similar power over an adjudicated case which the Law Court clearly and firmly rejected. That case, *Lewis v. Webb*, controls much of the law at issue in this appeal

In *Lewis,* the Legislature issued a "resolve" by which it directed the reopening and retrial of a probate case. *Lewis*, 3 Me. at 326. In addressing the Resolve, the Court posed three questions, the first of which was whether the nature of power the Legislature claimed to exercise legislative or judicial. The Court concluded that the Resolve had the effect of reopening a closed case and such a power was "purely judicial in its nature and its consequences." *Id.* at 332.

Having reached this conclusion, the Court considered counsel's argument that the Resolve was an acceptable exercise of legislative power because it would merely reopen the case, but adjudication would be left to the judiciary. *Id.* The Law Court was unimpressed. It remained that in purporting to reopen the case, the Legislature was arrogating a judicial power which it simply did not have. *Id.* at 332-333.

In reaching this conclusion, the Law Court cited three other cases—*Calder v. Bull,* 3 U.S. (3 Dall.) 386 (1798); *Merrill v. Sherburne*, 1 N.H. 199 (1818), *Holden v. James*, 11 Mass. 396 (1814). Each case concerned a legislative directive to the judiciary to reopen and re-try a probate case. In *Merrill* and

Holden, the Courts invalidated in the legislature's attempt on the same ground as *Lewis*—that the legislature was attempting to exercise a judicial power. The *Holden* Court was particularly emphatic, noting that the attempt was reminiscent of Blackstone's maxim that Parliament possessed "absolute despotic power." *Holden* at 404. In addressing the Resolve further, the Court went on to say that it could not suppose that in approving the Massachusetts Constitution, the people "intended to bestow, by implication on the General Court, one of the most odious and oppressive prerogatives of the ancient kings of England." *Id.* at 405.

In *Calder v. Bull,* the Supreme Court considered a claim that the Ex Post Facto Clause barred a similar measure by the Connecticut General Assembly. Although *Calder* found that the Resolve did not violate that clause, Justice Iedell did find that the power that the General Assembly had exercised, though permitted under the pre-Independence Connecticut Charter which was still in effect, was nonetheless a distinctly judicial power. *Id*. 398.

Thus, under *Lewis* and the cases cited therein, by seeking to direct the reopening of a finally adjudicated case the NECEC Initiative would arrogate a judicial function to the exercise of poplar legislation. It thus violates the separation of powers and this Court so find and, in full respect to the Maine citizens as Electors, bar it from the ballot.

The firmness and tone of the decisions in *Lewis, Holden*, and *Merrill* are consistent with the national experience with legislative intrusion into judicial matters. Each of these courts decisively, though respectfully, rejected the legislatures' attempts. These decisions give clear evidence that the courts understood what was at stake—not only judicial independence—but also the whole structure of government resting on a superior law and the allocation of governmental powers.

In so doing they also provided clear guidance to the legislatures as to where the lines between these two departments lay. To undersigned counsel's knowledge, at no time since has the Maine Legislature attempted to vacate a final judgment and direct a re-trial of a case on the merits. As difficult the courts' tasks were, it would appear the effect was salutary and lasting.

The NECEC Initiative proposes something much bolder than did the Fourth Legislature. It proposes not only to reopen a closed matter but to dictate both the findings and the result. This case presents this Court with the opportunity to send the same firm and clarifying message to the proponents of this Initiative and all future initiatives, that, as threshold matter, they must come within the power that the people granted themselves in article IV, part third, section 18 and that, if they do not, consistent that authority, they may not be submitted to the Electors of Maine.

Dated this 13th day, July, 2020.

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44. FUNDAMENTAL LAW AND THE BRITISH CONSTITUTION

Letters of the Massachusetts House to Ministry
January, 1768

(Bradford's *Massachusetts State Papers*, p. 137 ff.)

These addresses to the British Ministry were part of the protest of the Massachusetts General Court against the Townshend Acts of 1767. In January 1768 the Massachusetts House drew up a long letter to the Massachusetts agent, Dennis De Bredt, addresses to Shelburne, Chatham, Rockingham, Conway and Camden, the Lords of the Treasury, a petition to the King, and a circular letter to the other American colonies, Doc. No. 45. All of these documents were drafted by Samuel Adams. The extracts given below present one of the earliest formulations of the doctrine of fundamental law in the British constitution. The theory that Parliament could not pass acts contrary to fundamental law became a basic theory in American constitutional law. See also Otis's Speech on the Writs of Assistance, Doc. No. 32, the Resolutions of Virginia on the Stamp Act, Doc. No. 36, and the Massachusetts Circular Letter. The addresses of the House are given in full in Bradford's *Massachusetts State Papers;* an account of their authorship is in W. V. Wells, *Life and Public Services of Samuel Adams*, Vol. I, ch. vii. See also, C. F. Mullett, *Fundamental Law and the American Revolution;* R. G. Adams, *Political Ideas of the American Revolution;* A. C. McLaughlin, *Courts, Constitution and Parties*, ch. i.

1. LETTER OF THE MASSACHUSETTS HOUSE TO THE EARL OF SHELBURNE
January 15, 1768

There are, my Lord, fundamental rules of the constitution, which it is humbly presumed, neither the supreme legislative nor the supreme executive can alter. In all free states, the constitution is fixed; it is from thence, that the legislative derives its authority; therefore it cannot change the constitution without destroying its own foundation. If, then, the constitution of Great Britain is the common right of all British subjects, it is humbly referred to your Lordship's judgment, whether the supreme legislative of the empire may rightly leap the bounds of it, in the exercise of power over the subjects in America, any more than over those in Britain.

2. LETTER OF THE MASSACHUSETTS HOUSE TO THE MARQUIS OF ROCKINGHAM
January 22, 1768

My Lord, the superintending power of that high court over all his Majesty's subjects in the empire, and in all cases which can consist with the fundamental rules of the Constitution, was never questioned in this Province, nor, as the House concieve, in any other. But, in all free states the constitution is fixed; it is from thence that the supreme legislative as well as the supreme executive derives its authority. Neither, then, can break through the fundamental rules of the constitution without destroying their own foundation.

3. LETTER OF THE MASSACHUSETTS HOUSE TO LORD CAMDEN
January 29, 1768

If in all free states, the constitution is fixed, and the supreme legislative power of the nation, from thence derives its authority; can that power overleap the bounds of the constitution, without subverting its own foundation? If the remotest subjects, are bound by the ties of allegiance, which this people and their forefathers have ever acknowledged; are they not by the rules of equity, intitled to all rights of that constitution, which ascertains and limits both sovereignty and allegiance? If it is an essential unalterable right in nature, ingrafted into the British constitution as a fundamental law, and ever held sacred and irrevocable by the subjects within the realm, and that what is a man's own is absolutely his own; and that no man hath a right to take it from him without his consent; may not the subjects of this province, with a decent firmness, which has always distinguished the happy subjects of Britain, plead and maintain this natural constitutional right?